[Dated June 20, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NANCY GRACIA,	)	
	)	
Plaintiff,	)	
v.	)	No. 87 C 10005
	)	Hon. Paul E. Plunkett
	)	
VOLVO EUROPA TRUCK, N.V.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This products liability action is before this Court for ruling on objections to five reports and recommendations by Magistrate Judge Pallmeyer. In a report and recommendation dated March 6, 1996, Magistrate Judge Pallmeyer recommended that defendant Volvo Europa Truck, N.V.'s ("Volvo"), motion for summary judgment based on federal preemption be denied. Volvo has filed objections to the report and recommendation. In a second report and recommendation dated March 6, 1996, Magistrate Judge Pallmeyer recommended that Volvo's motion for summary judgment, in which Volvo asserted that the danger of windshield ejection, of which plaintiff Nancy Gracia ("Gracia") complains, was "open and obvious," be denied as well. Volvo has also objected to this report and recommendation.

On March 18, 1996, Magistrate Judge Pallmeyer recommended that Gracia's motion to quash the workers' compensation lien of third party defendant Brook Fur-

niture Rental ("Brook Furniture"), be denied. No objections have been filed to this report and recommendation. In addition, on March 20, 1996, Magistrate Judge Pallmeyer issued two reports and recommendations addressing evidentiary issues. In the first, she made recommendations regarding the parties' motions in limine. Both Gracia and Volvo have filed objections. In the second, she made recommendations regarding Volvo's motion to bar the expert testimony of Frank E. Camps, or in the alternative, to bar certain opinions and conclusions. Volvo has objected to portions of this report and recommendation.

For the reasons set forth below, we reject the March 6, 1996, report and recommendation on federal preemption, and we grant Volvo's motion for summary judgment on that issue. Because that issue is dispositive of this case, the remaining motions, reports and recommendations, and objections are all denied as moot.

Facts

Gracia suffered serious injuries on August 12, 1986, when she was thrown through the windshield of the 1986 Volvo FE6/13 truck ("Volvo truck") in which she was riding. The Volvo truck was a "forward control" vehicle, which means its windshield was flush with its front end, rather than being recessed as on a passenger car. In addition, the Volvo truck had a gross vehicle weight rating ("GVWR") of more than 10,000 pounds. The accident occurred when the Volvo truck struck the rear end of another vehicle traveling in the same direction on the Kennedy expressway. Gracia had been sitting on the engine cover between the driver's seat and the passenger seat. Gracia sued Volvo, the truck's manufac-

turer, asserting that the windshield retention system was unreasonably dangerous because it was inadequate to prevent the windshield from ejecting during foreseeable impacts. Gracia filed suit in the Circuit Court of Cook County on November 19, 1987, and Volvo removed the case to this Court.

Discussion

I. The Standard

Volvo's motions for summary judgment were before the magistrate judge pursuant to Rule 72(b) of the Federal Rules of Civil Procedure. As a result, our review of those portions of the magistrate judge's Report and Recommendation to which timely objections have been filed is *de novo*. Fed. R. Civ. P. 72(b). In providing for *de novo* review, Congress intended to permit whatever reliance a district judge, in the exercise of scund judicial discretion, chooses to place on the magistrate judge's findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676 (1980). We may "accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b).

Rule 56(c) of the Federal Rules of Civil Procedure allows us to grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In considering the evidence submitted by the parties, we do not weigh it or determine the truth of asserted matters. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 249 (1986). We are to view all facts and draw all reasonable inferences in the light most favorable to the non-moving party. *Transamerica Ins. Co. v. South*, 975 F.2d 321, 327 (7th Cir. 1992). "If no reasonable jury could find for the party opposing the motion, it must be granted." *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 931 (7th Cir. 1995) (citing *Anderson*, 477 U.S. at 248).

II. Volvo's Motion for Summary Judgment Based on Federal Preemption

A. The Doctrine of Preemption

Preemption has as its source the supremacy clause of the Constitution, which requires that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the contrary notwithstanding. 11 Art. VI, cl. 2. Federal law does not preempt state law unless Congress intended that it should. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Congress' intention may be gleaned from the explicit language of the federal statute ("express preemption") or implied from the statute's structure and purpose ("implied preemption"). *Id.* Where state law is not expressly preempted, it may be impliedly preempted where:

> the scope of a statute indicates that Congress intended federal law to occupy the field exclusively, *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990), or when state law is in actual conflict with federal law." We have found implied conflict pre-emption where it is "impossible for a private party to comply with both state and federal requirements," *id.* at 79, or where state law "stands as an obstacle to the accomplishment and execu-

> tion of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Freightliner Corp. v. Myrick, 115 S.Ct. 1483, 1487 (1995). *See also Barnett Bank of Marion County v. Nelson*, 116 S.Ct. 1103, 1108 (1996).

B. The Federal Statute and Regulations at Issue

The National Traffic and Motor Vehicle Safety Act (the "Safety Act"), 15 U.S.C. § 1381 *et seq.*, which Congress enacted for the express purpose of reducing traffic accidents and deaths and injuries to persons resulting from traffic accidents, delegates to the Secretary of Transportation the authority to establish "federal motor vehicle safety standards" ("FMVSS").[1] 15 U.S.C. § 1391(2), 1392(a). The Secretary of Transportation has delegated this authority to the National Highway Transportation Safety Administration ("NHTSA"). See 49 C.F.R. § 501.2. The Safety Act contains both a prohibition on the establishment of state standards which are not identical to FMVSS standards, 15 U.S.C. § 1392, and a savings clause which expressly states that compliance with any federal safety standard does not prohibit the imposition of common law liability. 15 U.S.C. § 1397(k).

The NHTSA has promulgated FMVSS 212, which sets windshield retention requirements for motor vehicles.[2]

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[1] In 1994, the Safety Act was recodified, without substantive change, at 49 U.S.C. § 30101 *et seq*. *See* Pub. L. No. 103-272, 1994 H.R. 1758. We use the original citations herein.

[2] The specific requirements of FMVSS 212 are not at issue here.

See 49 C.F.R. § 571.212.Sl. In 1986, as well as today, that standard applied to:

> Passenger cars, and to multipurpose passenger vehicles, trucks, and buses having a gross vehicle weight rating of 10,000 pounds or less. However, it does not apply to forward control vehicles, walk-in van-type vehicles, or to open-body type vehicles with fold-down or removable windshields.

49 C.F.R. § 571.212.S3.

C. Volvo's Objections to the Report and Recommendation

Volvo moved for summary judgment on the ground that Gracia's strict liability claim is preempted by the Safety Act and FMVSS 212, because the NHTSA made a conscious decision not to regulate windshield retention on forward control vehicles or vehicles with GVWR of more than 10,000 pounds. In opposing the motion, Gracia contended that the Safety Act's savings clause, which permits the imposition of common law liability where there is compliance with a federal motor vehicle safety standard, allows her to proceed with her claim against Volvo.

Magistrate Judge Pallmeyer reviewed the 1969 administrative history of the NHTSA's consideration of a proposed amendment to FMVSS 212, which would have included forward control vehicles in the scope of the standard. (Report and Recommendation of March 6, 1996, at 5.) She also considered the Automobile Manufacturers Association, Inc.'s ("AMA"), response to the pro-

posed amendment.[3] (*Id.* at 6-7.) She noted that the AMA had expressed the view that, on trucks, the windshield opening could act as a means of escape and thus would outweigh the advantages of increased windshield retention.[4] (*Id.* at 6.)

In rejecting Volvo's contention that FMVSS 212's exclusion of vehicles of the type at issue here meant the NHTSA had concluded there should be no regulation, the magistrate judge concluded that there was not sufficient evidence that the NHTSA had made an affirmative decision that regulation in this area would be harmful. (*Id.* at 7.) She found that a more reasonable reading of the administrative history indicated that the exclusion was based upon a lack of data demonstrating that an extension of the standard was necessary. *(Id.)* In its objections, Volvo points out that the magistrate judge's analysis does not mention any of the later administrative history of FMVSS 212. That history indicates, according to Volvo, a deliberate decision by the NHTSA to exclude forward control vehicles from FMVSS 212. This decision was grounded on the NHTSA's conclusion that, given the nature of the cab design in forward control vehicles, it was technically impracticable to design windshields which would comply to the standard.[5] Hence, Volvo rea-

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[3] The AMA's response to the proposed amendment was attached to Volvo's Mem. in Support of Mot. for Summary Judgment as Exhibit 6.

[4] The AMA reasoned that in accidents in which heavier trucks overturn onto their sides, the windshield opening is a more accessible escape route than attempting to open the passenger doors. (Volvo Mem., Ex. 6 at 3.5.)

[5] "Impracticable" means "not capable of being carried out." Webster's II New Riverside University Dictionary 615 (1984).

sons, the NHTSA did not leave the field of windshield retention in forward control vehicles unregulated (and therefore open to regulation by the states), but rather preempted the field by expressly excluding forward control vehicles from FMVSS 212.

Gracia did not respond to Volvo's objections.

D. Analysis

We begin our analysis of the preemption issue in this case by examining the language of the Safety Act to determine if state law is expressly preempted. Section 1392(d) of the Safety Act states:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). It is clear from this that state law is expressly preempted in certain circumstances, namely, where a federal standard regarding the same aspect of performance exists. However, where no such federal standard exists, state law is not preempted. *Freightliner*, 115 S.Ct. at 1487.

Here, the aspect of performance at issue is the windshield retention capabilities of forward control vehicles. Thus, before we can decide whether states may impose common law liability on this aspect of performance, we

must determine whether a federal standard exists.[6] FMVSS 212 is undeniably a federal standard regarding motor vehicle windshield retention capabilities. As our next step, then, we must determine its application to forward control vehicles. To do so, we must examine FMVSS 212 itself.

By its plain language, FMVSS 212 includes certain types of motor vehicles and excludes other types, including forward control vehicles. (It is undisputed that the Volvo FE6/13 truck at issue here is a forward control vehicle.) The presence of the exclusionary language must be interpreted to represent a conscious decision by the NHTSA; otherwise the exclusionary language has no meaning.[7] Its presence has a different impact upon our construction of the standard than if the NHTSA had been silent regarding forward control vehicles in FMVSS 212.[8] In other words, if the standard had merely recited the vehicles it included and had said nothing more, we would interpret the NHTSA's silence differently than we interpret its express exclusionary language.

The language of FMVSS 212 is significant to our preemption analysis because it is evidence of the intent of the NHTSA. The intent of the NHTSA matters because

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[6] State common law constitutes a form of regulation subject to preemption. *Cipollone*, 505 U.S. at 521.

[7] It is a basic tenet of statutory construction that we must read a statute or regulation in such a manner as to give effect to all of its language. *In re Lifschultz Fast Freight Corp.*, 63 F.3d 621, 628 (7th Cir. 1995).

[8] This is the case with vehicles with gross vehicle weight ratings [GVWR] over 10,000 pounds, for although they are not included in FMVSS 212, they are also not expressly excluded.

if the NHTSA intended that neither it nor the states should regulate windshield retention in forward control vehicles, then the states may not regulate that field through the imposition of common law liability. In that case, the NHTSA has preempted the field. If, on the other hand, the NHTSA intended to refrain from its own regulation but to permit regulation by the states, then the states may impose common law liability. The answer to this question may well be dispositive of Gracia's claim.

To resolve this issue, we must determine the reason for the NHTSA's exclusion of forward control vehicles. Because FMVSS 212 does not contain an explanation for the exclusion, we turn to the administrative history. In 1969, the NHTSA (or, more accurately, its predecessor, the Federal Highway Administration), published notice of a proposed amendment to FMVSS 212 which would expand its scope beyond passenger vehicles to "multipurpose passenger vehicles, trucks, and buses." (Volvo's Mem., Ex. 5 at 14438.) The notice commented that the proposed amendment was "part of an integrated program aimed at accomplishing the widely accepted goal of keeping occupants within the confines of the passenger compartment during a crash." *(Id.)* In 1972, the NHTSA, in a continuation of the notice of the proposed amendment to FMVSS 212, noted that the amendment would "extend the standard to multipurpose passenger vehicles, trucks, and buses, having a gross vehicle weight rating (GVWR) up to 10,000 pounds." (Volvo Mem., Ex. 7 at 16980.) It went on to comment, however:

> It is recognized that forward control vehicles may have difficulty achieving windshield retention since objects impacted by the front of such a vehicle tend to either impact the windshield it-

> self, or deform the windshield mounting. Recognizing this Problem, the standard would not be applicable to forward control vehicles until September 1, 1978.

(Id.) Two years later, the NHTSA, in a further continuation of the notice of the proposed amendment to FMVSS 212, again stated:

> The NHTSA agrees that the windshield in a forward control vehicle is likely to be instantly contacted in a collision and be unable to restrain passengers . . .

(Volvo Mem., Ex. 8 at 2275.) Then, in 1976, in yet another continuation of the notice of the proposed amendment, the NHTSA explained:

> [F]orward control vehicles and open-body vehicles with fold-down windshields are excluded from the application of the standard because of the impracticability of conforming with the requirement.

(Volvo Mem., Ex. 9 at 36193.) Finally, in 1977, after the proposed amendment had been adopted in a modified form, the NHTSA again commented:

> "Open-body type" vehicles and "forward control" vehicles were excluded because of the impracticability of applying the barrier crash test to these vehicles. General Motors has pointed out that the NHTSA failed to exclude "walk-in van-type" vehicles, which have essentially the same configuration and amount of front-end crush space as forward control vehicles.
>
> . . . On reconsideration of the extended applicability of Standard No. 212 to these vehicles, the agency concludes that the same rationale applies.

> Accordingly, the applicability of Standard No. 212 to walk-in van-type vehicles is withdrawn.

(Volvo Mem., Ex. 4 at 34289.) This led to the current language of FMVSS 212 excluding forward control vehicles, walk-in van-type vehicles, and open-body type vehicles with fold-down or removable windshields.

Under section 1392(d) of the Safety Act, if there were no windshield retention standard, we would undoubtedly conclude that the states could adopt any standard they chose. If FMVSS 212 were silent regarding forward control vehicles, we would be inclined to reach the same result, for the same reasons. Here, however, the standard expressly excludes the type of vehicle at issue, on the grounds that it is not feasible for such vehicles to conform with the standard. We must determine whether, as Gracia argued in opposing Volvo's motion for summary judgment, this determination leaves the states free to regulate windshield retention in forward control vehicles, or whether, as Volvo argues, it means that the NHTSA thinks no one should regulate it.

We think the answer has to be the latter. The NHTSA made a factual determination that requiring forward control vehicles to conform to FMVSS 212 is impracticable given the design of such vehicles. Gracia has presented no evidence in opposition to Volvo's motion which would indicate that the NHTSA lacked sufficient evidence to support its conclusion or that the NHTSA's conclusion was incorrect. Allowing the states to require forward control vehicles to conform to the standard set by FMVSS 212 would be permitting them to adopt a standard which is not identical to the federal standard, and section 1392 of the Safety Act expressly prohibits

this. 15 U.S.C. § 1392(d). For this reason, we conclude that the NHTSA's explicit exclusion of forward control vehicles from FMVSS 212 expressly preempts the aspect of performance of windshield retention for such vehicles.

It is not entirely clear whether Gracia's theory of liability is that Volvo had a duty under the common law to comply with the standard set by FMVSS 212, or whether she contends that Volvo should have complied with some other windshield retention standard. In bringing its motion for summary judgment, Volvo stated only that it anticipated that Gracia would assert Volvo's noncompliance with FMVSS 212. Gracia did not comment on her theory of liability when she opposed that motion. While her failure to disagree with Volvo's assertion suggests her agreement with it, we nonetheless address the question of whether she may proceed using a different standard than the one contained in FMVSS 212.

Once again, we must answer the question in the negative. The Safety Act expressly states that the standards promulgated by the NHTSA are to be minimum safety standards. 15 U.S.C. § 1392(a). What we really have in this case is a conclusion by the responsible federal agency that the minimum safety standard should be that it is not technically feasible to adopt a minimum standard; in other words, the federal standard is that there should be no standard regarding windshield retention for the type of vehicle at issue. Any standard proposed by Gracia would not be identical to this and would run afoul of section 1392(d). Therefore, even if Gracia proposes a standard other than that contained in FMVSS 212, her claim is still preempted.

Our conclusion is bolstered by the Supreme Court's analysis regarding the preemptive effect of another FMVSS in *Freightliner Corp. v. Myrick*, 115 S.Ct. 1483 (1995). The issue in that case was whether truck manufacturers could be held liable for the allegedly negligent design of tractor-trailers because those designs did not include antilock braking systems ("ABS"). *Id.* at 1485. In the two cases consolidated for appeal, the drivers of oncoming vehicles had been seriously injured or killed when tractor-trailers jackknifed into oncoming traffic while attempting to brake suddenly. *Id.*

The NHTSA had promulgated FMVSS 121 in the early 1970s, which imposed stopping distance and vehicle stability requirements on air-brake equipped vehicles. *Id.* at 1486. The stopping distances set forth in FMVSS 121 required the use of ABS devices, and some manufacturers requested that the NHTSA amend the standard because they considered ABS devices dangerous. *Id.* The NHTSA refused. *Id.* The manufacturers then sought review of FMVSS 121 by the Ninth Circuit, which remanded the case to the NHTSA because it concluded that "'the Standard was neither reasonable nor practicable at the time it was put into effect.'" *Id.* (quoting *Paccar, Inc. v NHTSA*, 573 F.2d 632, 640 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978)). The Ninth Circuit found that ABS devices had a high failure rate and might actually serve to increase the dangers to drivers. *Id.* Therefore, the Ninth Circuit suspended FMVSS 121 until the NHTSA compiled sufficient evidence to justify it. *Id.* The NHTSA did not seek to reinstate it and did not adopt any other safety standard governing the same aspects of performance on air-brake equipped vehicles. *Id.*

The Supreme Court determined that, because FMVSS 121 remained suspended, there was no federal safety standard applicable to the aspects of performance at issue, namely, the stopping distance and vehicle stability of trucks and trailers. *Id.* at 1487. As a consequence, the states "remain free to establish, or to continue in effect, their own safety standards concerning those aspect[s] of performance." *Id.* (quoting 15 U.S.C. § 1392(d)). In rejecting the manufacturers' argument that the absence of a federal standard constituted a form of regulation, the Court distinguished between the circumstance before it, where the NHTSA had been silent, and the circumstance in which the NHTSA had determined that there should be no regulation. *Id.* It reasoned:

> Here, there is no evidence that NHTSA decided that trucks and trailers should be free from all state regulation of stopping distances and vehicle stability. Indeed, the lack of federal regulation did not result from an affirmative decision by agency officials to refrain from regulating air brakes. NHTSA did not decide that the minimum, objective safety standard required by 15 U.S.C. § 1392(a) should be the absence of all standards, both federal and state. Rather, the lack of a federal standard stemmed from the decision of a federal court that the agency had not compiled sufficient evidence to justify its regulations.

Id.

Here, we do not have a situation like that in *Freightliner*, where there was a lack of a federal standard.[9] Rather, we have a federal standard which the NHTSA has determined should not apply to forward control vehicles. To use the language of the Court in *Freightliner*, there has been "an affirmative decision by agency officials" that there should be no standard because the nature of the cab design on forward control vehicles makes compliance with the minimum standard set by FMVSS impracticable. The imposition of state common law liability, which could only be based upon the contradictory conclusion that the design of forward control vehicles does not make compliance with the minimum standard of FMVSS 212 impracticable, would be to impose a state standard which is not identical to the federal one. Therefore, Gracia's common law strict liability claim addressing the windshield retention capabilities of forward control vehicles is expressly preempted by section 1392(d) of the Safety Act.

Our determination that Gracia's claim is preempted means we must grant Volvo's motion for summary judgment and enter judgment in its favor. As a consequence, the remaining motions, reports and recommendations, and objections are moot, and we deny them on that basis.

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[9] We might well conclude that there was no applicable federal standard if Volvo's argument was based solely upon the truck at issue having a GVWR of more than 10,000 pounds. As we noted earlier, FMVSS 212 simply does not mention such vehicles. We need not resolve this question, however.

Conclusion

For the foregoing reasons, we reject the magistrate judge's report and recommendation on defendant Volvo Europa Truck, N.V.'s motion for summary judgment on the issue of federal preemption. We find that plaintiff Nancy Gracia's claim is preempted, and we therefore grant Volvo's motion for summary judgment. All other pending motions, reports and recommendations, and objections are denied as moot. This order is final and appealable.

ENTER:

UNITED STATES DISTRICT JUDGE

DATED: June 20, 1996